STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 1999
v	No. 204109 Oakland Circuit Court
TOMMY W. FUGATE, Defendant-Appellant.	LC No. 96-149794 FC

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Before trial, defendant pleaded guilty to being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant subsequently pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Thereafter, defendant was sentenced to two years' imprisonment for felony-firearm, consecutive to and followed by concurrent terms of twenty-eight to sixty years' imprisonment for second-degree murder and two to seven and one-half years' imprisonment for felon in possession of a firearm. This Court dismissed defendant's claim of appeal with respect to his conviction and sentence for felon in possession of a firearm for lack of jurisdiction, "because there is no appeal of right from a judgment of sentence entered pursuant to a plea for an offense that occurred after December 26, 1994."[1] Defendant appeals as of right from his remaining convictions and sentences, and we affirm.

I. Ineffective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel at trial. Because defendant did not move the trial court for a new trial on this ground, and there has been no *Ginther*[2] hearing, we will limit our review of defendant's claim of ineffective assistance of counsel to mistakes apparent on the record.[3] *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To prove ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so

prejudiced the defendant as to result in deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must further show that the result of the proceeding was fundamentally unfair or unreliable, and a reasonable probability that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

A. Guilty Plea

Defendant first asserts that counsel improperly advised him to plead guilty to felon in possession of a firearm, on the ground that defendant likely would have benefited had his jury passed on that question. Defendant reasons that he should have taken advantage of the possibility that the jury might have exercised its prerogative to return an inconsistent or compromise verdict that could have treated him more leniently than did the trial court in response to his guilty plea. However, because this Court dismissed defendant's claim of appeal with respect to that plea-based conviction for lack of jurisdiction, we here decline to review defendant's ineffective-assistance argument stemming from that conviction.

B. Jury Instructions

Defendant's next claim of ineffective assistance of counsel relates to counsel's withdrawal of his request for jury instructions on self-defense plus the lesser offenses of involuntary manslaughter and reckless discharge of a firearm. Defendant asserts that the evidence supported instructions on those theories, and that counsel's failure to insist on these instructions effectively deprived defendant of both a defense and his opportunity to present his theory of the case to the jury.

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

We conclude that counsel's decision not to request an instruction on self-defense was a sound trial tactic under the circumstances. Counsel obviously determined that defendant's best strategy was to maintain that the shooting was accidental, not in any way intentional or deliberate.
An instruction on self-defense would necessarily have carried with it some implication that defendant may have intended to shoot the victim after all. Counsel reasonably concluded that the self-defense theory could be advanced only in derogation of the principal defense posture that the shooting was wholly accidental. Thus, defense counsel chose to pursue the accident defense, which, if found credible by the jury, would have exonerated defendant entirely of second-degree murder, or the lesser charged offense of voluntary manslaughter, because it would have eliminated the intent element. On the other hand, if the jury did not believe the self-defense theory, an alternative self-defense assertion would have conceded the intent element for murder and voluntary manslaughter and rendered remote any possibility that the jury would acquit him. See *LaVearn, supra*, at 216 (counsel, faced with the choice of two weak and mutually inconsistent defenses, reasonably chose the one that could have led to acquittal to the exclusion of the one that could have led to conviction of a lesser offense).

The same rationale holds for counsel's decision not to request instructions on the lesser offenses of involuntary manslaughter and reckless discharge of a firearm. Because a defendant may be convicted of these lesser offenses upon a finding of criminal negligence, the defense of accident is inapplicable. See *People v Hess*, 214 Mich App 33, 39; 543 NW2d 332 (1995) ("'accident' is subsumed within the charge of involuntary manslaughter because the jury must consider whether the defendant's conduct was negligent, careless, reckless, wilful and wanton, or grossly negligent"). Thus, to instruct the jury on involuntary manslaughter and reckless discharge of a firearm would have been to invite convictions of those offenses even if the jury believed that the shooting was an accident. Again, defense counsel's decision to try to obtain defendant's acquittal through emphasizing defendant's contention that the shooting was an accident was an exercise of sound trial strategy.

Further, because the jury was presented with an opportunity to convict defendant of the lesser offense of voluntary manslaughter, yet still returned a verdict of guilty of second-degree murder, any potential error in counsel's failure to request instructions on additional lesser offenses was harmless. Because the jury did not choose to convict of the lesser offense of voluntary manslaughter, it could hardly have affected the outcome that the jury was not instructed to consider still lesser offenses whose elements include defendant's theory of accident that the jury clearly rejected. See MCR 2.613(A) (reversal is appropriate only where to do otherwise would be "inconsistent with substantial justice"); *People v Mateo*, 453 Mich 203, 212; 551 NW2d 891 (1996) ("reversal is not required unless an error is harmful").

C. Hearsay or Relevance

Finally, defendant argues that counsel was ineffective for failing to object to hearsay or irrelevant testimony, contending that the unobjected-to evidence resulted in an unfair trial. We disagree.

Defendant's argument stems from a prosecution witness' testimony that defendant once "pulled a gun" on her and others in a house. We find untenable defendant's attempt to characterize this testimony as hearsay, in that the witness testified that she was present and personally observed the conduct she described. This evidence was not hearsay at all, but rather admissible testimony by a lay witness as to her perception of an event. MRE 701.

We likewise reject defendant's arguments that this evidence was inadmissible under MRE 404(b) as a prior bad act, and that the evidence was more prejudicial than probative under MRE 403. First, the statement was not offered to prove that defendant had a criminal propensity and that he was acting in conformity therewith at the time of the incident. Rather, the testimony was offered to defeat defendant's suggestion that he drew his gun reasonably in response to threatening circumstances, as well as to establish his state of mind at the time of the offense. Several witnesses testified that defendant was insecure and paranoid. The testimony to which defendant objects was offered to confirm that defendant's irrational aggression against the victim was consistent with his earlier conduct manifesting a paranoid belief that others were threatening him. Thus, the evidence in question had substantial probative value to an issue in the case, and the possibilities for unfair prejudice were minimal.

Further, the prosecutor intended to establish that if defendant had previously threatened others with his gun because he sensed they were going to hurt him, but on that earlier occasion had sufficient self-control to refrain from shooting, he could likewise have controlled his violent impulses during his confrontation with the victim. Thus, defendant's lack of control in the latter instance indicates that defendant acted from motives or intentions other than the general paranoia he had evidenced before. Accordingly, the challenged testimony was offered for a proper purpose under MRE 404(b). "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Our review of the record persuades us that counsel's decisions concerning objections and presentation of evidence all followed from sound trial strategy. For these reasons, we conclude that defendant's claim of ineffective assistance of counsel is without merit.

II. Jury Instructions

Defendant argues that the trial court committed error requiring reversal by failing to instruct the jury sua sponte on the lesser included offenses of involuntary manslaughter and reckless discharge of a firearm. He asserts that the evidence presented at trial supported an instruction on these offenses, and that in failing to tender them the court violated its duty to instruct the jury on defendant's theories and defenses in the case, even in the absence of such a request from defense counsel. We disagree.

Because defendant accepted the jury instructions as given by the court, this issue is not preserved for appellate review. A trial court's failure to instruct on any point of law is not grounds for setting aside a verdict unless the instruction was requested by the accused. MCL 768.29; MSA 28.1052. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. MCL 769.26; MSA 28.1096; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). "Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case." *Id*.

We are not persuaded that defendant suffered manifest injustice as a result of the omitted jury instructions. As discussed above, the instructions would have been inconsistent with defendant's theory of the case and his asserted defense, and defense counsel's decision not to request such instructions followed from sound trial strategy.

In *Hess*, *supra*, this Court stated as follows:

> When accident is asserted as a defense and a voluntary manslaughter instruction is given by the court sua sponte,[4] the court must also instruct concerning involuntary manslaughter. Justice requires that instructions be given concerning both offenses in order to give the jury the option of convicting the defendant consistently with the defendant's testimony, evidence, and theory of the case. [*Id.* at 39 (citations omitted).]

Although this statement appears to support defendant's argument on appeal, *Hess* is distinguishable from the instant case. In *Hess*, the trial court had erroneously instructed the jury that accident was not a

defense to voluntary manslaughter, thus allowing the jury to find the defendant guilty of that crime even if it believed the killing resulted from an accidental shooting. *Id.* In the instant case, the trial court's instruction on voluntary manslaughter included no such error, and its instructions concerning second-degree murder specifically credited defendant's contention that if the shooting was accidental then defendant was not guilty. Although the court did not specifically state that accident was also a complete defense to voluntary manslaughter, the court did make clear that voluntary manslaughter was a lesser form of intentional homicide than second-degree murder, the distinction being that the perpetrator acted on provocation. Thus, the jury, if it followed instructions, could not have convicted defendant if it had believed his accident defense. Indeed, the trial court in this instance seems simply to have acquiesced in the defense strategy of giving the jury no choice but to acquit if it believed that the shooting was an accident.

For the proposition that a voluntary-manslaughter instruction must be accompanied by an involuntary-manslaughter instruction, *Hess, supra* at 39, cited *People v Jones*, 395 Mich 379; 236 NW2d 461 (1975). In *Jones*, the Supreme Court offered the following discourse concerning facts very similar to those in the instant case:

> The prosecutor claimed intentional shooting, the defendant maintained it was accidental. The jury was not obliged to accept either theory but could have concluded that the killing was the result of criminal negligence, *e.g.*, involuntary manslaughter. Had the judge not instructed at all on manslaughter, there would be no reversible error, because no request for instruction on manslaughter was made.
>
> Having undertaken to do so, however, it was reversible error to give a misleading instruction which recognized only the prosecution's theory but not the defendant's. [*Id.* at 393 (citations omitted).]

However, an important factual distinction between *Jones* and the instant case is that in *Jones* the trial court's instructions included only a fragmentary mention of the significance of accident. *Id.* at 394. The Supreme Court concluded that the instruction on voluntary manslaughter was incomplete without one on involuntary manslaughter, because "[t]he court did not instruct the jury that if the jury found the shooting was accidental it should find the defendant not guilty." *Id.* In contrast, in the instant case, the trial court did in fact instruct the jury on defendant's accident defense, explaining that if "defendant did not mean to kill, or did not realize that what he did would probably cause death, then he's not guilty of murder."

We hold that where a trial court's instructions concerning accident allow for acquittal upon acceptance of that defense, no manifest injustice follows from declining to provide further instructions that would allow for conviction of a lesser offense upon acceptance of that theory.[5]

Similarly, the court did not err by failing to instruct the jury sua sponte on the lesser misdemeanor offense of reckless discharge of a firearm. Such an instruction would have been but another invitation to convict despite believing defendant's accident theory. That being the case, just as it was sound trial strategy for defense counsel not to request that instruction, it was not error for the trial court to decline to provide it sua sponte. Although a court has discretion to provide instructions on

misdemeanors as lesser alternatives to felony charges, *People v Stephens*, 416 Mich 252, 258-261; 330 NW2d 675 (1982), defendant cites no authority for the proposition that a court *must* so instruct a jury sua sponte. Indeed, "[t]he first condition for a lesser included offense instruction is a proper request." *Id.* at 261. Just as defense counsel displayed no lack of competence in striving for complete acquittal in the event that the jury believed the accident defense, the trial court had no duty to take the initiative to instruct the jury on ways to convict defendant even if it did believe that the shooting was accidental.

III. Evidence of Other Bad Acts

Defendant asserts that the trial court erred in admitting evidence of defendant's other bad acts, on the ground that it was more prejudicial than probative and should have been excluded under MRE 403 or 404(b). Defendant further maintains that, having admitted the evidence, the trial court had a duty sua sponte to provide the jury with a cautionary or limiting instruction on how to consider that evidence. We disagree.

Defendant did not object to the admission of this evidence at trial, and thus this issue is not preserved for appellate review. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Where a defendant fails to object to the challenged evidence, the issue has been waived on appeal, and this Court need review the claim of error only as needed to prevent a miscarriage of justice. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). We find no miscarriage of justice here. Defendant bases his argument on the same testimony from a prosecution witness that gave rise to his arguments concerning hearsay and relevance, part I, subpart C, where we concluded that admission of the evidence was proper under both MRE 403 and 404(b).

Regarding whether the court should have issued a cautionary instruction on how to consider the evidence, while the authorities require such an instruction if requested by a party, they do not require the court to offer such an instruction on its own initiative. See *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly" (emphasis added). See also MRE 105. Because defendant did not request a limiting instruction in this instance, we find no manifest injustice and decline to review the claim further.

IV. Sufficiency of Evidence to Prove Second-Degree Murder

Defendant argues that there was insufficient evidence of his intention to kill or do great bodily harm to satisfy the malice requirement of second-degree murder. We disagree. When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the elements of the crime were proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

In order to convict a defendant of second-degree murder, the prosecution must prove that the defendant caused the death of another person with malice and without justification, mitigation, or excuse. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Malice may be established by showing either an intent to kill, intent to inflict great bodily harm, or intent to create a very high risk of death with knowledge that the act probably would cause death or great bodily harm. *Id.* "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In the instant case, defendant admitted to the police that he shot the victim, thus leaving only the question whether there was sufficient evidence that defendant did so with the requisite intent for second-degree murder. When reviewing the sufficiency of the evidence, this Court is not permitted to interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified on other grounds, 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Here, the verdict indicates that the jury disbelieved defendant's accident defense and credited the testimony of witnesses that suggested that defendant acted intentionally. Further, by rejecting the alternative of manslaughter, the jury obviously concluded that defendant intentionally shot the victim. The jury's verdict was supported by competent evidence, including the testimony of numerous witnesses, whose credibility we will not reexamine. Accordingly, viewing the evidence in the light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to persuade a reasonable jury beyond a reasonable doubt that defendant shot the victim with at least a reckless disregard of the natural tendency of that action to cause the victim serious bodily harm.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] *People v Fugate*, unpublished order of the Court of Appeals, entered October 17, 1997 (Docket No. 204109).

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[3] Defendant moved this Court to remand to the trial court for proceedings on this claim, but this Court denied the motion "for failure to persuade the Court of the necessity of a remand at this time." *People v Fugate*, unpublished order of the Court of Appeals, entered January 15, 1998 (Docket No. 204109).

[4] We cannot tell from the record in this case whether the trial court tendered the instruction on voluntary manslaughter sua sponte or at the request of counsel. However, we need not remand for an answer to that question, because our resolution of this issue does not depend on whose initiative prompted the manslaughter instruction.

[5] The jury's finding that defendant was guilty of second-degree murder indicates that the jury disbelieved the accident theory. Because the jury concluded that defendant satisfied the intent element for second-

degree murder, had the trial court technically erred in failing to give an instruction on involuntary manslaughter, which offense presupposes accident, *Hess, supra* at 39, the error would not have affected the outcome and thus have been harmless. See *People v Sykes*, 229 Mich App 254, 277; 582 NW2d 197 (1998) (improperly admitted testimony was harmless error because there was no reasonable probability that the error affected the outcome).